Supreme Court, U.S.
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No. 93-1145

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993.

JOHN E. FILIOS, ET AL.,
Petitioners,

v.

COMMISSIONER OF REVENUE OF MASSACHUSETTS,
Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

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Question Presented

Pursuant to the Court's order of March 4, 1994, the respondents address the following supplemental issue:

Was the petition for certiorari timely filed under 28 U.S.C. § 2101(c)(1988)?

Table of Contents.

Question Presented 1

Statement 1

Argument 4

I. THE PETITION IS UNTIMELY AS TO JOHN AND ELEANOR FILIOS. 4

II. THE PETITION IS UNTIMELY AS TO THE NON-FILIOS PETITIONERS. 7

Conclusion 10

Table of Authorities.

Cases.

Conboy v. First National Bank of Jersey City, 203 U.S. 141 (1906) 8

Credit Company, Limited v. Arkansas Central Railway Company, 128 U.S. 258 (1888) 8

Department of Banking of Nebraska v. Pink, 317 U.S. 264 (1942) 6

FTC v. Minneapolis-Honeywell Co., 344 U.S. 206 (1952) 6, 9

FCC v. League of Women Voters, 468 U.S. 364 (1984) 9

Filios v. Commissioner of Revenue, 415 Mass. 806, 615 N.E.2d 933 (1993) 2, 4

Market Street Railway Co. v. Railroad Commission of California, 324 U.S. 548 (1945) 8

Missouri v. Jenkins, 495 U.S. 33 (1990) 6-8

Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U.S. 131 (1937) 8

Statutes, Regulations & Court Rules.

28 U.S.C. § 1201(c) 8

Fed. R. App. P. 35(a) 6

Supreme Court Rule 13 4, 8

Supreme Court Rule 13.4 4, 5

Mass. Gen. Laws c. 58A, § 7 2

Mass. Gen. Laws c. 62C, § 39 2

Mass. R. App. P. 27(a) 5

Mass. R. App. P. 27(b) 5

Miscellaneous.

Stern and Gressman, *Supreme Court Practice* (7th ed. 1993) 9

Ward, The Federal Rules of Appellate Procedure, 28 Federal B.J. 100 (1968) 6

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COMMISSIONER OF REVENUE OF MASSACHUSETTS,
Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

Pursuant to the Court's order dated March 4, 1994, the respondent, Commissioner of Revenue of Massachusetts ("Commissioner"), submits this supplemental brief in opposition to the petition filed by petitioners.

Statement

1. The final judgment of the Massachusetts Supreme Judicial Court is dated July 13, 1993. The application of petitioner John A. Filios to extend time for filing a petition for a writ of certiorari was denied by Justice Souter on October 15, 1993. On October 26, 1993, the Supreme Judicial Court granted the petitioners' motion to amend their notice of appeal

in that court to name separately appellants in addition to John A. Filios. The petition for a writ of certiorari was served on behalf of 27 individual taxpayers on or about November 17, 1993, more than 90 days after the Supreme Judicial Court's original judgment, but within 90 days of the Supreme Judicial Court's October 26 Order allowing amendment of the notice of appeal. On January 18, 1994, the Clerk sent notice that this case was docketed on November 22, 1993. The timeliness of this petition turns upon the procedural history leading up to the Supreme Judicial Court's judgment of July 13, 1993 and its subsequent October 26, 1993 Order.

2. At various times in late 1989 and 1990, the Commissioner denied each of the applications for abatement filed by the 27 taxpayers named in the petition for certiorari. Pet. App. A-7. The taxpayers appealed to the Massachusetts Appellate Tax Board ("Board"), which upheld the Commissioner's decision. Pet. App. A-2. See Mass. Gen. Laws c. 62C, § 39; c. 58A, § 7.

Two of the petitioners, John and Eleanor Filios ("the Filios petitioners"), filed a notice of appeal from the Board's decision, but failed to name the other 25 petitioning taxpayers ("non-Filios parties") in the notice of appeal. Responding to an argument in the Commissioner's brief in the Supreme Judicial Court, the taxpayers filed a motion to amend their notice of appeal on March 26, 1993, to which the Commissioner assented. See appendix to this supplemental brief ("SA") at page SA-8. On July 13, 1993, the Supreme Judicial Court of Massachusetts affirmed the Board. *Filios* v. *Commissioner of Revenue*, 415 Mass. 806, 615 N.E.2d 933 (1993), Pet. App. A-44 to 51. In the same opinion, the Court ruled that, due to the failure to name all 27 taxpayers in the

notice of appeal, "[t]he only appeal before us is that of John E. and Eleanor G. Filios." *Id.*, A-45, n.2.

On July 22, 1993, the petitioners sent a letter to the Clerk of the Supreme Judicial Court, which is reprinted at SA-3 to 4. The letter informed the clerk of the petitioners' intention to file a petition for a writ of certiorari. It also stated:

> In order to clarify an issue that may arise in connection with that petition, I would also like to request information on the status of the Appellants' Motion for Leave to File Amended Notice of Appeal and the Amended Notice of Appeal filed on March 26, 1993, together with Appellants' Reply Brief.

Id. A substantially similar letter was sent to the clerk of the Supreme Judicial Court on October 1, 1993. SA-2.

On October 12, 1993, petitioner John E. Filios (but not Eleanor G. Filios) filed in this Court an application to extend the time to file a petition for a writ of certiorari. The application was denied by Justice Souter on October 15, 1993.

On October 26, 1993, the Supreme Judicial Court of Massachusetts granted the petitioners' "request to reconsider [their] motion to amend the notice of appeal to separately name the 27 [sic] individuals not named in the notice of appeal" (i.e. all parties other than John Filios). Pet. App. A-52. It stated that the allowance was "for purposes of seeking review in the Supreme Court of the United States." *Id.* The Supreme Judicial Court directed that allowance of the motion be reflected in the docket, but that its published opinion "will remain unchanged." *Id.*

The petitioners served their petition for a writ of certiorari on or about November 17, 1993, which was docketed as filed on November 22, 1993.

Argument

I. THE PETITION IS UNTIMELY AS TO JOHN AND ELEANOR FILIOS.

John E. and Eleanor G. Filios were parties to the Supreme Judicial Court's decision, issued on July 13, 1993. *Filios*, 415 Mass. at 807 n.2, 615 N.E.2d at 933 n.2, A-45 n.2. They had a right to apply for certiorari for 90 days thereafter, until October 9, 1993, pursuant to Supreme Court Rule 13. John, but not Eleanor, Filios applied for an extension of time to file the petition, which was denied by Justice Souter on October 15, 1993. Their petition, filed on November 22, was untimely.

In their reply brief, the petitioners argue for the first time that their petition was timely under the second sentence of Supreme Court Rule 13.4, which reads, in relevant part:

> [I]f a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment.

See also Brief for the United States as Amicus Curiae Supporting Petitioners, p. 8 n.6 (quoting rule, but taking no position on the timeliness issue).

Under Massachusetts law, a petition for rehearing is timely if "filed with the clerk of the appellate court within fourteen days after the date of the rescript unless the time is shortened or enlarged by order." Mass. R. App. P. 27(a), reproduced below at SA-1 to 2. The petition must "be in the form of a letter to the senior justice of the quorum or panel which decided the appeal with seven clear and legible copies . . ." Mass. R. App. P. 27(b).

While the petitioners do not specify the alleged petition for rehearing upon which they rely, the only document filed within the time for rehearing was the petitioners' July 22 letter to the Clerk of the Supreme Judicial Court. SA-9. That document does not constitute a "petition for rehearing" within Supreme Court Rule 13.4 (second sentence). By its terms, it was only a request for "information" from the clerk on the status of a pending motion, rather than a petition for the Supreme Judicial Court to take some action to alter its decision. As a letter to the clerk (not "the senior justice of the quorum."), it not only departed from the formal requirements of Mass. R. App. 27(b), but also failed to alert the court and counsel to any request for judicial action, as opposed to a simple clerical response. The clerk, in fact, docketed the letter as "Notice of intent to file petition for certiorari . . .." SA-9.

Nor did the petitioners' actions reflect any understanding that the letter was a request for rehearing. They filed a motion in this Court requesting the Circuit Justice to extend time for filing a petition for certiorari, which would have been superfluous under Rule 13.4 if a timely petition for rehearing had been filed.

This court has held that a document is not a petition for rehearing if it does "not seek to have the [State's highest court]

reconsider any question decided in the case." *Department of Banking of Nebraska v. Pink*, 317 U.S. 264, 266 (1942). The Court noted that in that case the "final judgment already rendered was not challenged . . ." and held that the document in question was not a petition for rehearing. *Id.* A memorandum does not qualify as a petition for rehearing if it "was labeled neither as a petition for a rehearing nor as a motion to amend the previous judgment, and in no manner did it purport to seek such relief". *FTC v. Minneapolis-Honeywell Co.*, 344 U.S. 206, 210 (1952). Under these authorities, petitioners' letter of intent, which also sought information from the clerk, does not constitute a petition for rehearing, because it does not challenge the judgment.

The distinction between petitions for rehearing and other post-judgment documents is also reflected in the federal rules' distinction between Petitions for Rehearing and Suggestions for Rehearing In Banc. See Fed. R. App. P. 35(a)(rehearing in banc), 40(a)(petitions for rehearing). The essence of the former avenue is that the "panel is required to consider the contentions in the petition for rehearing, if only to reject them. Rehearing in banc is a discretionary procedure . . . . 'A suggestion is neither a petition nor a motion; consequently, it requires no disposition by the court'". *Missouri v. Jenkins*, 495 U.S. 33, 46, n.14 (1990), quoting Ward, The Federal Rules of Appellate Procedure, 28 Federal B.J. 100, 110-111 (1968).

Petitioners' letter to the clerk informing the Supreme Judicial Court of an intention to apply for certiorari and seeking information does not amount to a petition for rehearing, because it does not require judicial action within the

meaning of *Jenkins*. It follows that the time for filing a petition for certiorari in this case expired on October 9, 1993. The filing on November 22 was therefore untimely.

II. THE PETITION IS UNTIMELY AS TO THE NON-FILIOS PETITIONERS.

In the absence of a timely petition for rehearing, there is also a jurisdictional issue with respect to the non-Filios petitioners.[1] For this group of petitioners, the question is whether, after the time for certiorari had already run, the Court's Order of October 26, 1993 could effectively revive the right to petition for certiorari by adding parties to the July 13 judgment.

The case presents this issue upon particularly stark facts. The two sets of petitioners here have always been part of one group, represented by the same counsel, making the same arguments on virtually identical facts. Pet. at A-44 to 51. The Supreme Judicial Court of Massachusetts allowed their motion to amend the notice of appeal expressly "for purposes of seeking review in the Supreme Court of the United States." (Pet. at A-52). It underscored that purpose by specifying that the Court's published opinion "will remain unchanged". *Id.*

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[1] The petitioners' reply brief (p. 3) refers to an alleged "concession" that the petition for a writ of certiorari is timely as to the non-Filios petitioners. While the respondents argued that the petition was "untimely, at least as to John and Eleanor Filios" (Opposition at p. 13), they made no such concession. In any event, the matter is jurisdictional and cannot be conceded by counsel. See *Jenkins*, 495 U.S. at 45.

In such a case, "[t]he time for applying for certiorari will not be tolled when it appears that the lower court granted rehearing or amended its order solely for the purpose of extending that time." *Missouri v. Jenkins*, 495 U.S. at 49,[2] citing *Wayne United Gas Co. v. Owens-Illinois Glass Co.*, 300 U.S. 131, 137 (1937); *Conboy v. First National Bank of Jersey City*, 203 U.S. 141, 145 (1906); *Credit Company, Limited v. Arkansas Central Railway Company*, 128 U.S. 258, 261 (1888). Indeed, if a judgment may be revived in the fashion attempted here, then there is no such thing as "the final word of a final court." See *Market Street Railway Co. v. Railroad Commission of California*, 324 U.S. 548, 551 (1945). Intervention by a new party or the amendment of a state court notice of appeal more than 90 days after a State Supreme Court's final judgment "for purposes of seeking review in the Supreme Court of the United States" would create an easy route for avoiding the time limits of 28 U.S.C. § 1201(c) and Supreme Court Rule 13. In order to prevent such circumvention of the rules, the Court has held:

> When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which

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[2] Unlike *Jenkins*, 495 U.S. at 49-50, this case does not involve a lower court's determination that the document before it was in fact a petition for rehearing. This Court's analysis of the facts in *Jenkins* demonstrates that a *nunc pro tunc* amendment of a judgment for the purpose of extending the time to petition for certiorari would not confer jurisdiction upon the United States Supreme Court.

> limits the time within which an appeal can be taken would be a dead letter.

Credit Co., 128 U.S. at 261. See also *Minneapolis-Honeywell Co.*, 344 U.S. at 211 ("the time within which a losing party must seek review cannot be enlarged just because the lower court in its discretion thinks it should be enlarged.").

Even if there were justification for entering a new order for the purposes of extending the time to petition for certiorari, the non-Filios parties' petition falls within the rule that "the mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought." *Minneapolis-Honeywell Co.*, 344 U.S. at 211 (footnote omitted). *FCC v. League of Women Voters*, 468 U.S. 364, 373 n.10 (1984). See generally Stern and Gressman, *Supreme Court Practice*, pp. 287-89 (7th ed. 1993). Nothing in the October 26, 1993 Order of the Supreme Judicial Court alters any issue upon which certiorari is sought. The state court's October 26 Order expressly did not change the published opinion, and addressed only the status of the non-Filios parties, given the failure to name them in the original notice of appeal. The question whether a *state* court notice of appeal includes parties not specifically named in the notice is not and could not be the subject of the present petition. All issues included in the petition were finally resolved by the Supreme Judicial Court's July 13, 1993 judgment, so that, in the absence of a timely petition for rehearing, the petition filed on November 22 was jurisdictionally out of time.

Conclusion

For the foregoing reasons, as well as those stated in the Respondent's Brief in Opposition[3], the petition for a writ of certiorari should be denied.

Respectfully submitted,

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of Massachusetts

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[3] The respondent also notes the pendency of a state legislative proposal, filed by the Governor with his annual budget bill in the Massachusetts House of Representatives, which would exempt from state income taxation "any income received from the United States government as military retirement compensation, to the extent included in federal gross income, regardless of whether the recipient contributed to the military retirement system." 1994 Mass. House Doc. 1, § 53 (Jan. 1, 1994).

Statutory Provisions Involved

28 United States Code § 2101(c).

Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Massachusetts Rules of Appellate Procedure

Rule 27. Petition For Rehearing

(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing should be filed with the clerk of the appellate court within fourteen days after the date of the rescript unless the time is shortened or enlarged by order. It shall state with particularity the points of law or fact which it is contended the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted, except by order of the quorum or panel which decided the appeal. No answer to a petition for rehearing will be received unless requested by the quorum or panel, but a petition for rehearing will ordinarily not be granted in the absence of such a request. A petition for rehearing shall be decided by the quorum or panel which decided the appeal. If a petition for rehearing is granted, the quorum or panel may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed

appropriate under the circumstances of the particular case. Action upon a petition is in the discretion of such quorum or panel, which may award costs, including a reasonable attorney's fee, to the prevailing party.

(b) Form of Petition; Length. The petition shall be in a form of a letter to the senior justice of the quorum or panel which decided the appeal with seven clear and legible copies, and additional copies shall be mailed by first class mail or delivered to all other counsel. Except by permission of the quorum or panel, a petition for rehearing shall not exceed ten pages of standard typewritten material.

NEW ENGLAND LEGAL FOUNDATION

July 22, 1993

Jean M. Kennett, Clerk
Supreme Judicial Court
for the Commonwealth
1412 Suffolk County Court House
Boston, MA 02108

RE: *Filios* v. *Commissioner of Revenue*, C.A. No. 6066, 415 Mass. 806 (1993)

Dear Ms. Kennett:

I am counsel for the Appellants in the above-captioned case. My clients have instructed me to inform the Court and counsel for the Commissioner that it is their present intent to seek further review of this matter by filing a petition for a writ of certiorari with the U.S. Supreme Court.

In order to clarify an issue that may arise in connection with that petition, I would also like to request information on the status of the Appellants' Motion for Leave to File Amended Notice of Appeal and the Amended Notice of Appeal filed on March 26, 1993, together with Appellants' Reply Brief. That motion was filed in order to clarify that the appeal in this matter was filed on behalf of all 14 parties in the consolidated Appellate Tax Board proceeding.

As I informed the Court at oral argument, that Motion was not opposed by counsel for the Appellee Commissioner of Revenue. However, the court's decision in this case does not refer to or specifically address what, if any, action has been taken on that motion. *See* 415 Mass. at 807, n. 2.

Although of course my clients and I were disappointed in the decision in this matter, I wish to thank you and counsel for the Commissioner for the courtesy and professionalism your office and the Department of the Attorney General have repeatedly demonstrated in this matter.

Sincerely,

S/
Stephen Ostrach

cc: Douglas H. Wilkins, AAG

150 LINCOLN STREET * BOSTON, MA 02111
*(617) 695-3660 * FAX (617)695-3656

NEW ENGLAND LEGAL FOUNDATION

October 1, 1993

Jean M. Kennett, Clerk
Supreme Judicial Court
for the Commonwealth
1412 Suffolk County Court House
Boston, MA 02108

RE: *Filios* v. *Commissioner of Revenue*, C.A. No. 6066, 415 Mass. 806 (1993)

Dear Ms. Kennett:

I am counsel for the Appellants in the above-captioned case. My clients have instructed me to inform the Court and counsel for the Commissioner that it is their present intent to seek further review of this matter by filing a petition for a writ of certiorari with the U.S. Supreme Court.

In order to clarify an issue that may arise in connection with that petition, I would also like to request information on the status of the Appellants' Motion for Leave to File Amended Notice of Appeal and the Amended Notice of Appeal filed on March 26, 1993, together with Appellants' Reply Brief. That motion was filed in order to clarify that the appeal in this matter was filed on behalf of all 14 parties in the consolidated Appellate Tax Board proceeding. A copy of that motion is attached.

As I informed the Court at oral argument, that Motion was not opposed by counsel for the Appellee Commissioner of Revenue. However, the court's decision in this case does not refer to or specifically address what, if any, action has been taken on that motion. *See* 415 Mass. at 807, n. 2.

In view of the approaching deadline for seeking certiorari I would appreciate being informed of the Court's action on our motion as soon as possible.

As always, I appreciate your assistance.

Sincerely,

S/
Stephen Ostrach

cc: Douglas H. Wilkins, AAG

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[Docket Sheet]

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

SJC-06066

John E. Filios & others vs. Commissioner of Revenue
[identifying information and appearances omitted]

PAPER	DATE	ENTRY
1.0	10/13/92	Entered.
2.0	11/05/92	MOTION to extend to 11/19/92 filing of brief of Plaintiffs/Appellants by Stephen Ostrach, Esquire. ALLOWED. Notice to Counsel.
3.0	11/06/92	Appearance of Stephen Ostrach as co-counsel for plaintiffs/appellants.
4.0	11/30/92	MOTION to extend to 12/11/92 filing of brief of Plaintiffs/Appellants and for filing of brief for Defendant/Appellee to 1/15/93. Assented and ALLOWED. Notice to counsel.

5.0	12/21/92	SERVICE of brief & appendix for Plaintiff/Appellant John E. Filios by Stephen S. Ostrach, Esquire
6.0	01/13/93	MOTION to extend to 02/19/93 filing of brief of Defendant/Appellee Commissioner of Revenue by Thomas A. Barnico, A.A.G. Assented and ALLOWED. Notice to counsel.
7.0	02/17/93	MOTION to extend to 03/05/93 filing of brief of Defendant/Appellee Commissioner of Revenue by Douglas H. Wilkins, A.A.G.: Assented and ALLOWED. Notice to counsel.
8.0	03/05/93	SERVICE of brief for Defendant/Appellee Commissioner of Revenue by Douglas H. Wilkins, A.A.G., Thomas A. Barnico, A.A.G..
8.5	03/26/93	MOTION to file amended notice of appeal (to separately name 27 individuals, consolidated in court below) filed by Stephen Ostrach, Esquire (assented for defendant by Douglas H. Wilkins, A.A.G.). REFER TO QUORUM.

8.6	03/29/93	SERVICE of reply brief for plaintiffs/appellants by Stephen S. Ostrach, Esquire.
	05/03/93	Oral argument held. (CJL A N LY).
9.0	07/13/93	RESCRIPT JULY 13, 1993. The decision of the Appellate Tax Board is affirmed. Reasons as on file. Notice to counsel.
10.0	07/23/93	Notice of intent to file petition for certiorari, filed by Atty. Stephen Ostrach.
11.0	10/04/93	Request for action on the Appellants' Motion for Leave to File Amended Notice of Appeal (with the Amended Notice of Appeal) filed by Stephen Ostrach, Esquire. (See Paper #8.5).
12.0	10/25/93	ORDER: The request to reconsider the plaintiffs' motion to amend the notice of appeal to separately name the 27 individuals consolidated in the trial court is hereby allowed for purposes of seeking review in the Supreme Court of the United States. The docket shall reflect the allowance of the motions. The published opinion of this court will

		remain unchanged. (By the Court (Abrams, J.))
13.0	01/24/94	Notice received from U.S. Supreme Court of filing of petition for certiorari. Forwarded to author.